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The Reconstruction of Mediation: A Shift Toward Cultural Competency and Social Sophistication

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THE RECONSTRUCTION OF MEDIATION: A SHIFT TOWARD CULTURAL COMPETENCY AND SOCIAL SOPHISTICATION

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I. INTRODUCTION

In January 2019, pop culture icon Jay-Z brought attention to a critical issue that has existed for decades but has rarely been addressed—that is, the lack of diverse arbitrators and the effect this has on fundamental fairness.[1] While Jay-Z was not the first to speak up about this issue, his

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[1] *See* Darlene Ricker, *Jay-Z's ADR Problems: Mogul's Case Spotlights Lack of Diverse Arbitrators*, A.B.A. J. (May 1, 2019), https://www.abajournal.com/magazine/article/jay-z-adr-problems [perma.cc/WUY9-N7D6].

powerful voice was perhaps heard louder than those before him. This issue extends to mediators as well, given that both professions interact with parties to resolve disputes, and many professionals serve as both arbitrators and mediators.

This Article is focused on mediation, and while it touches briefly on the lack of diversity among available mediators, it primarily focuses on the perception of fairness and the lack of trust that can result therefrom. The concern is that a mediator may not be adequately aware of cultural, personal, and social differences between mediating parties and between the parties and their mediator. Potential differences between the parties and between their mediator could consist of, but are not limited to, gender, race, religion, creed, sexual orientation, financial means, physical disabilities, and visible or non-visible disabilities. This Article poses the question—how does a mediator's conscious or unconscious bias with respect to cultural, personal, or social differences affect a mediation? Do parties still perceive mediators who differ from them in one of these areas as favoring someone

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> The lack of diversity in arbitration and mediation has drawn increasing attention in legal circles, but it took someone with a huge audience and a lot of money at stake to propel the issue into the headlines. In a dispute stemming from the $200 million sale of his clothing line, rapper and entrepreneur Jay-Z (whose real name is Shawn Carter) in November [2019] challenged an arbitration clause as discriminatory, stating it would force him to select an arbitrator from a list nearly devoid of his ethnic group. Only three of 200 arbitrators on the large and complex case roster provided by the American Arbitration Association identified themselves as African-American, and one of them had a conflict, he argued.

Id. In this matter, Jay-Z's attorney, Alex Spiro, a partner at Quinn Emanual Urquhart & Sullivan, maintained "that the equal protection clause of the New York state constitution guarantees an ADR participant's access to the judicial system," while the other party to the arbitration argued "that parties who agree to arbitrate know they may be giving up some protections and rights in exchange for having their dispute decided quickly and privately." *Id.* Spiro says,

> "Given that arbitration clauses have become ubiquitous for large corporations and regular people buying Starbucks gift cards, it is crucial that arbitrations operate fairly" . . . . "Part of what that means is that they protect all people equally under the law. And what that means—at least to me—is that there ought to be some choice for people in the process to at least have the option of selecting among a diverse slate of arbitrators." While acknowledging there should be diversity in arbitration, Justice Saliann Scarpulla stated at a hearing on the Jay-Z matter in November [of 2019]: "This is a private agreement between two individuals. You could have said in your contract, 'I want the Dalai Lama to decide my case,' and that's your private right." She added, "If people are dissatisfied with the diversity of the AAA, don't put the AAA panel in your agreement. Go somewhere else. Do something that makes a difference."

Id.

who is more like the mediator in these ways? Simply put, *without having some way to see oneself in their mediator or of knowing that their mediator has tried to become culturally aware and sensitive to other's lived experiences, is there a lack of trust?*

At the time of writing this Article, we find ourselves slowly crawling out of a global shutdown due to the Coronavirus pandemic that has taken approximately half a million American lives.[2] We are immersed in what will be memorialized as a major civil rights movement after the very public death of George Floyd, as well as many others,[3] at the hands of the police.[4] Our environment is subjected to natural disasters on a more frequent basis.[5] The very system that legal professionals have dedicated their lives to is being called into question every day by political leaders.[6] Together with a plethora of other humanitarian and cultural conflicts, this time has been referred to as apocalyptic, and sadly, that adjective is quite fitting. Name-calling, rage, and echo chambers driven by the lack of neutral rhetoric are rampant.[7] The

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[2] *COVID Data Tracker*, CTRS. FOR DISEASE CONTROL & PREVENTION (Feb. 20, 2021), https://covid.cdc.gov/covid-data-tracker/index.html#cases_casesinlast7days [perma.cc/P7YH-8G29].

[3] George Floyd was far from the only Black person killed at the hands of police. Others, from our nation's most recent memory, include Breonna Taylor, Tamir Rice, Philando Castille, and Eric Gardner. *Breonna Taylor: Timeline of Black Deaths Caused by Police*, BBC NEWS (Jan. 6, 2021), https://www.bbc.com/news/world-us-canada-52905408 [https://perma.cc/C8SB-PJML].

[4] On May 25, 2020, George Floyd, a forty-six-year-old African American man, was killed while in police custody in Minneapolis, Minnesota. Eliott C. McLaughlin, *How George Floyd's Death Ignited a Racial Reckoning that Shows No Signs of Slowing Down*, CNN (Aug. 9, 2020), https://www.cnn.com/2020/08/09/us/george-floyd-protests-different-why/index.html [perma.cc/R8HY-CVLA].

[5] *See generally* Chelsea Harvey, *Scientists Can Now Blame Individual Nature Disasters on Climate Change*, SCI. AM. (Jan. 2, 2018), https://www.scientificamerican.com/article/scientists-can-now-blame-individual-natural-disasters-on-climate-change/ [https://perma.cc/BH3G-R6HF] (noting that climate change can make events, like floods, droughts, hurricanes, and wildfires, more frequent and/or severe). *See, e.g.*, Matthew Cappucci, *Tropical Storm Eta Likely to Form in Caribbean to Start Potentially Busy November in the Tropics*, WASH. POST (Oct. 30, 2020) https://www.washingtonpost.com/weather/2020/10/30/tropical-storm-eta-caribbean/ [perma.cc/3EVY-DJT9] (noting that the 2020 Atlantic hurricane season has produced more named storms than any other Atlantic hurricane season in history and at an unprecedented pace).

[6] President Donald Trump repeatedly granted clemency to political figures and people who have shown loyalty to him. Matthew Schwartz, *Roger Stone Clemency Latest Example of Trump Rewarding His Friends, Scholars Say*, NPR (July 12, 2020), https://www.npr.org/2020/07/12/890075577/roger-stone-clemency-latest-example-of-trump-rewarding-his-friends-scholars-say [perma.cc/E5QS-GKSW].

[7] *See generally* Am. Psych. Ass'n & Nat'l Inst. for Civ. Discourse, National Conversation on Civility Panel at The George Washington University (Sept. 26, 2018) (analyzing the rise in negative social discourse, including the role played by stress, the breakdown of meaningful

American people appear to be involved in a culture war that breeds mistrust of those who hold different beliefs about fundamental principles related to race, gender, or sexuality—some altogether denying that marginalized people in our country are at any disadvantage.[8] This is the United States of America.

The legal profession is uniquely positioned to tackle issues of equity both on the grandest of stages as well as in the smallest of interpersonal circles. Those individuals whom society trusts to resolve disputes are faced with an urgent opportunity to build confidence in the fairness of legal proceedings like mediation. This Article argues that more education surrounding differences in culture, individuality, and social background is necessary if parties are to resolve disputes with confidence, and that these differences must be understood and accounted for in mediation.

At its core, mediation, which is a subset of the Alternative Dispute Resolution ("ADR") family, is a facilitated resolution structure dating back thousands of years.[9] The idea that two parties may seek outside counsel to work towards resolution is embedded in cultures across the world.[10] It is without question that the American justice system influenced modern mediation practices in the United States, while remaining a distinct process. In fact, mediation can be a welcomed reprieve from the costly "winner take all" litigation strategies implemented through much of the United States' legal system.

Even though it has evolved for thousands of years, modern-day mediation is not a foolproof process or without room for growth. Part II of this Article focuses on the origin and process of mediation.[11] Part III explores the importance of cultural competency and social sophistication in theory and practice.[12] It considers the benefits that education can provide in helping mediators understand both the importance of perceiving and actually gaining awareness around differences in culture, individuality, and social background. Furthermore, through this education and awareness,

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dialogue on issues between people with differing opinions, and the negative impact of digital media on how people interact).

[8] *See* Jeremy W. Peters, *How Abortion, Guns and Church Closings Made Coronavirus a Culture War*, N.Y. TIMES (Apr. 20, 2020), https://www.nytimes.com/2020/04/20/us/politics/coronavirus-protests-democrats-republicans.html [https://perma.cc/XG8C-5CBQ]; German Lopez, *The Battle Over Identity Politics, Explained*, VOX (Aug. 17, 2017), https://www.vox.com/identities/2016/12/2/13718770/identity-politics [perma.cc/CKH7-5G56] (explaining the role of identity politics in American politics, especially electoral politics).

[9] Julia Ann Gold, *ADR Through a Cultural Lens: How Cultural Values Shape Our Disputing Processes*, 2005 J. DISP. RESOL. 289, 309 (2005).

[10] *Id.*

[11] *See infra* Part II.

[12] *See infra* Part III.

mediators can establish the foundational trust essential to improving the prospect of dispute resolution. Part IV focuses on implementing this awareness so that mediation can better serve all parties.[13]

II. THE ORIGIN AND PROCESS OF MEDIATION

A. The Origin

Mediation is deeply rooted in history, and its existence dates back thousands of years.[14] "It was used in traditional and indigenous societies in China, Japan, Africa, and the Americas and continues to be used in many [indigenous and] rural societies."[15] While there have been various iterations of mediation, most likely reflective of the time and culture in which it was being used, mediation is without question a long-established process for facilitated resolution.[16]

> Even before the advent of formal ADR bodies and procedures in mainstream society, Indigenous peoples have long used ADR-like mechanisms—also referred to as Indigenous Dispute Resolution—to resolve existing rows between their own membership, with other tribes or with newer settlers. These involve Indigenous paradigms, beliefs and "Aboriginal Wisdom." Disputes are resolved based on the Indigenous community's culture and custom. These include traditional teachings, respect, relationships, interconnectedness, spirituality, prayers, storytelling, "saving face," recounting of facts, and emotions. Group consensus is the goal to be achieved, as well as the maintenance of good relations with other community members, solidarity and reciprocal obligations—also known as *K'e* in the Navajo culture. Indigenous Dispute Resolution processes are characterized by flexibility, utilization of cyclical time, qualitative measurement of success and people-orientation. The person in the middle of the process is not just persuasive, but exemplifies the virtues of a teacher and planner, given his or her "reputation for wisdom and knowledge of traditional lore."[17]

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[13] *See infra* Part IV.
[14] *See infra* Part IV.
[15] *See infra* Part IV.
[16] *See infra* Part IV.
[17] Carlo Osi, *Understanding Indigenous Dispute Resolution Processes and Western Alternative Dispute Resolution Cultivating Culturally Appropriate Methods in Lieu of Litigation*, 10 CARDOZO J. CONFLICT RESOL. 163, 194 (2008).

It was not until the early 1900s that the United States began evaluating what ADR could look like in American culture, focusing originally on arbitration—the more formal sibling to mediation.[18] "Arbitration is a private and generally informal trial procedure by which parties can adjudicate disputes."[19] It is extrajudicial and "functions as an alternative to litigation. It yields binding determinations through less expensive, more efficient, expert, and fair proceedings."[20] In 1925, Congress enacted the Federal Arbitration Act.[21] Thirty years later, the National Conference of Commissioners on Uniform State Laws successfully encouraged states to adopt the 1955 Uniform Arbitration Act.[22] Both Acts validated agreements to arbitrate to different degrees.[23] Over the following decades, amid America's Second Reconstruction, the idea of using ADR processes began to gain traction.

> During the 1950s, 1960s, and 1970s, the idea of using ADR processes more broadly to resolve legal disputes progressively took hold of the imagination of American lawyers, legal scholars, and court reformers as a result of three predominant concerns: overloaded court dockets

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[18] Tim K. Klintworth, *The Enforceability of an Agreement to Submit to a Non-Arbitral Form of Dispute Resolution: The Rise of Mediation and Neutral Fact-Finding*, 1995 J. DISP. RESOL. 181, 184–85 (1995) (until the 1900s, courts largely found mandatory arbitration agreements unenforceable unless specifically permitted by statute).

[19] THOMAS E. CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION 1 (5th ed. 2014).

[20] *Id.*

[21] Pub. L. No. 68–401, 43 Stat. 883 (1925) (reenacted and codified at 9 U.S.C. § 1 *et seq.* (1947)).

[22] *See* Nat'l Conf. of Comm'rs on Unif. State L., *Uniform Arbitration Act with Prefatory Note and Comments*, NAT'L CONF. COMM'RS ON UNIF. STATE L. 1, 1 (2000)

> The Uniform Arbitration Act (UAA), promulgated in 1955, has been one of the most successful Acts of the National Conference of Commissioners on Uniform State Laws. . . . A primary purpose of the 1955 Act was to insure the enforceability of agreements to arbitrate in the face of oftentimes hostile state law.

Id.

[23] Klintworth, *supra* note 18, at 184–85.

> Throughout the 1900's, United States courts expressed the view that an agreement to arbitrate an existing or future dispute was unenforceable unless allowed by a specific statute. In 1920, New York enacted the first statute which enforced agreements to arbitrate future disputes. In 1925, the first Uniform Arbitration Act was adopted. It provided only for the irrevocability of agreements to arbitrate existing disputes. In 1925, Congress moved to change the common law by enacting the Federal Arbitration Act which stated that written agreements to arbitrate existing or future disputes were valid, irrevocable and enforceable. In 1955, the second Uniform Arbitration Act was adopted, making agreements to arbitrate future disputes irrevocable.

Id.

> causing litigants expense and delay; the need for specialized private fora for resolving disputes such as those involving commercial matters; and concerns that "the system was incapable in more fundamental ways of living up to the ideals of 'access to justice' for all." During this early period of the ADR movement, practitioners from the field of labor relations played a central role in many of the grassroots efforts to organize dispute resolution professionals.[24]

However, Professor Emeritus Frank E.A. Sander of Harvard Law School is often credited with sparking the popularity of the modern American ADR system.[25] In 1976, Sander delivered a seminal address, "Varieties of Dispute Processing," at the Pound Conference in St. Paul, Minnesota.[26] The Pound Conference convened to discuss and address issues of dissatisfaction with the legal system.[27] Sander proposed a "comprehensive justice center" as a remedy for the backlog in courts.[28] Sander's reimagination of the traditional ADR system crystalized its real possibility of being a "new door" to the courthouse.[29]

While both arbitration and mediation are part of the ADR family, they are distinguishable. "[A]rbitration is neither negotiation [nor] mediation."[30] "By agreeing to arbitrate the parties confer full legal authority on the arbitrators to adjudicate their disputes, [that is], to render a final disposition on the matters submitted that can be enforced through coercive legal means."[31] In mediation, a decision is only made at the behest of the parties. ADR continues to evolve and has proven to be indispensable in the American justice system, as many judges often require it prior to trial to encourage settlement.[32]

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[24] Valerie A. Sanchez, *Back to the Future of ADR: Negotiating Justice and Human Needs*, 18 OHIO ST. J. ON DISP. RESOL. 669, 677–80 (2003).

[25] Richard C. Reuben & Margaret L. Shaw, *Teacher, Mentor, Friend, Leader*, 19 DISP. RESOL. MAG. 4, 5 (2012).

[26] Frank E.A. Sander, Varieties of Dispute Processing Addresses delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (April 7–9, 1976), *in* 70 F.R.D. 111 (1976).

[27] Sanchez, *supra* note 24, at 679.

[28] Sander, *supra* note 26, at 130–31.

[29] *Id.* at 112.

[30] CARBONNEAU, *supra* note 19, at 1 (citing Robert A. Baruch Bust, *Substituting Mediation for Arbitration: The Growing Market for Evaluative Mediation and What It Means for the ADR Field*, 3 PEPP. DISP. RESOL. L.J. 111, 118 (2002); Jean R. Sternlight, *Is Binding Arbitration a Form of ADR?: An Argument That the Term "ADR" Has Begun to Outlive its Usefulness*, 2000 J. DISP. RESOL. 97, 103 (2000)).

[31] CARBONNEAU, *supra* note 19, at 1.

[32] *The Paths of Civil Litigation*, 113 HARV. L. REV. 1851, 1852–53, 1859 (2000).

B. The Process

Formal mediation is a negotiation facilitated by a neutral third party in an effort to seek resolution.[33] It is prudent to note that while formal education for mediators is encouraged and necessary in some instances (such as being formally listed as an available mediator with the Court system or being court-certified),[34] calling oneself a mediator and practicing mediation rarely requires such credentials.[35] The mediation process is

> In the 1980s, social scientists, game theorists, and other scholars showed how ADR mechanisms could facilitate settlement by dealing proactively with heuristic biases through the strategic imposition of a neutral third party. Meanwhile, process-oriented ADR advocates emphasized that problem-solving approaches would yield remedies better tailored to parties' unique needs and that the more direct involvement of disputants would encourage greater compliance with outcomes and help rebuild ruptured relationships. Some supporters lauded ADR for its potential to restore a culture of civility to the legal system.

Id. at 1853.

[33] BENNETT G. PICKER, MEDIATION PRACTICE GUIDE 2–3 (2d ed. 2003).

[34] Minnesota requires mediators of the courts to undergo training—requirements are dependent upon the type of law. *See* MINN. R. 114.13 (2005). *See also Court Certified Mediator Qualification Requirements in the US*, https://legalstudiesms.com/learning/court-certified-mediator-qualification-requirements/#MN [https://perma.cc/Y8CC-D9ZU].

[35] *See* Mark Killian, *Section Thinks all Mediators Should be Certified*, FL. BAR (Feb. 15, 2017), https://www.floridabar.org/the-florida-bar-news/section-thinks-all-mediators-should-be-certified/ [https://perma.cc/GK2B-DK5P] ("Section member and certified mediator Karen Evans of Miami said mandating certification would be an affront to 'party self-determination,' and 'some of the best mediators around' are not certified."). As a result, any person could feasibly work in the realm of mediation, simply by calling themselves a mediator and/or providing some iteration of mediation services. Although seemingly less common in modern American culture, an example of this would be a business consultant or coach—a professional who is familiar with business and is identified as a neutral third-party that business owners choose to help facilitate discussions and resolution in the instance that they disagree. Another example of this practice may be an individual who a multi-generational extended family trusts with their family affairs, a consigliere of sorts, who is identified as a neutral third-party chosen to help facilitate discussions and resolution in the instance of familial disagreement. However, formal education is encouraged and necessary for some mediators, such as those practicing as court certified mediators and those listed by the courts themselves. *See* MINN. GEN. R. PRAC. 114.13 (2005) (detailing the training, standards, and qualifications for neutral rosters in Minnesota).

> Minnesota requires mediators of the courts to undergo training—the requirements are dependent upon the type of law. Court rosters are overseen by the State Court Administration. To become a court-qualified neutral, mediators must take an ADR that meets the requirements in Rule 114.13: (a) Civil mediation—30 hours of basic training including at least 15 hours of role-play, or (b) family mediation—40 hours of basic training including at least six hours each of family law and domestic abuse, five hours of family economics, four hours each of conflict theory, psychological issues, and issues of children in divorce, and two hours of ethics training. Qualified neutrals must also complete

intended to be flexible and facilitative, guiding self-determined parties to a resolution. That is, "the process is voluntary rather than coercive, and parties preserve their control over the outcome."[36] "The mediator moves the process along and facilitates communication between the parties."[37] The bulk of the mediation is spent in a series of joint or private sessions with the mediator, wherein the mediator gathers information, listens to the parties, and asks questions. Since mediators serve as neutrals, they lack the power to make a decision as to the outcome of the matter, but still wield a significant amount of power. "[M]ediators have the power to affect important legal rights in a wide variety of ways—such as steering the conversation in one way or another, stressing or de-stressing legal issues, critiquing legal cases, evaluating settlement proposals, and any other number of common mediator techniques."[38] Mediators also control procedure, which can have an impact. For instance, an important procedural choice is the extent to which mediators will be directive or facilitative with the substance of the dispute.[39] If the parties are able to reach an agreement, the mediator may also assist in preparing a settlement agreement.

In evaluating the benefits of mediation, it is useful to look at how people handle disputes and what is required for parties to engage in a collaborative form of dispute resolution. In mediation, most discourse originates from contained interactions, as opposed to unmediated conversation, which risk becoming uncontained and exacerbating some amount of existing animosity. That risk is seen in our country's current state, where unmonitored interactions have led to rising animosity.[40]

In an attempt to find a resolution, there must be trust, and trust is found in commonalities between parties or the parties believing that the

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at least 18 hours of continuing ADR education within each three-year period.

Court Certified Mediator Qualification Requirements in the US: Minnesota, LEGAL STUD. MASTER'S DEGREES, https://legalstudiesms.com/learning/court-certified-mediator-qualification-requirements/#MN [https://perma.cc/2SCV-56Z6].

[36] *See* CARRIE MENKEL-MEADOW, LELA PORTER LOVE & ANDREA KUPFER SCHNEIDER, MEDIATION: PRACTICE, POLICY & ETHICS 92 (1st ed. 2006).

[37] *Id.* at 91.

[38] Kristin Blankley, *Is a Mediator Like a Bus? How Legal Ethics May Inform the Question of Case Discrimination by Mediator*s, 52 GONZAGA L. REV 327, 346 (2017).

[39] *See generally* Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 24–35 (1996) (surveying different approaches that mediators employ when conducting a mediation).

[40] *See generally* William L. F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming*, 15 L. & SOC'Y REV. 631 (1980–81).

other party has made an effort to understand and respect them.[41] This includes respecting and understanding their culture and identity. If there is an inability to relate or understand each other, trust will be near impossible to build.[42] And if the parties do not trust each other, they will not be able to resolve their disputes effectively.[43]

If truly embraced by the legal profession, mediation can resolve existing disparities in one's ability to defend or fight for oneself. In these cases, having a third party to bounce thoughts off of and carry some of the burdens of delicate topics can be very helpful. As a process, mediation can be beneficial in seeking resolution because it is non-coercive and does not rely solely on formal rights. This can minimize disparities among parties.

However, maximizing this benefit requires something that is often a missing piece from the legal professional in general—*emotion*. As a consequence of today's legal education, these professionals are taught to set aside emotion and to personally distance themselves so that they may logically approach any matter without emotional constraint. Emotion can divert the professional from rational and precedential analysis of a legal issue. Yet, perhaps the best mediators do not merely enforce the technical letter of the law, but truly understand that emotions are at the root of most legal issues. The litigants' emotions and deepest personal problems become part of the conflict resolution process.[44] At the very least, litigants' emotions must be heard and processed, if not addressed in a more in-depth discussion. This is especially important since the request or directive to seek mediation recurringly arises out of the adversarial process, which often sets the tone for conflict rather than learning, listening, and trying to understand each party's views. As a result, understanding the emotions of parties who have different ways of addressing conflict is vital. Establishing the parties' trust is indispensable to this process because a party who feels they are not being heard or understood will likely not reap the benefits of mediation, and settlement may consequently be unattainable.

Still, listening to and understanding how the parties' emotional undertones may be affecting their positions in a mediation does not mean that a mediator should feel pressed to set aside the law. A mediator will likely have insight into how a case could play out in litigation, which, when

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[41] Arthur Pressman, *The Importance of Trust in the Mediator*, MEDIATE.COM (Aug. 2018), https://www.mediate.com/articles/pressman-importance-trust.cfm [perma.cc/GDX8-3XTP] ("Mediation literature supports the importance of trust in the mediator as a decisive factor in the success of mediation.").

[42] *Id.* (referencing a study which identified "chemistry with the parties" as one of the top five factors indicating trust in the mediation process).

[43] *Id.*

[44] Sharon Press, *Court-Connected Mediation and Minorities: A Report Card*, 39 CAPITAL U. L. REV. 819, 827 (2011) (internal citations omitted).

addressed in mediation, can benefit all those involved. Regardless of the mediator's approach, whether facilitative or directly addressing legal precedent and outcomes, or a combination of the two—trust in the mediator is the key to making the process work, irrespective of if a resolution is reached or not.[45] If a party feels unheard or judged by the mediator, the party will have a negative experience regardless of whether the mediator facilitated a resolution or not.[46]

While focusing more squarely on precedent and legal arguments does not necessarily mean that the mediation will fail to reach a resolution, preventing both parties from expressing their overarching theories of dispute resolution runs the risk of insensitivity to the parties' cultural and individual differences. Instead, the parties may feel that they are simply going through the motions in a pre-set process that was not built to care for those differences. "Being sensitive and aware of the nuances of cross-cultural negotiations allows mediators to work more fully and more effectively within our diverse, multicultural world."[47] Education in, and attention to, parties' cultural, social, and individual backgrounds allows the mediation process to be trusted and allows it to work as intended.

C. In Practice

> In practice, some argue that the best cases for mediation are: [T]hose in which: the cost of litigation is high; there are multiple parties; there is a combination of the possibility of large damages and contested liability; there is the need to preserve ongoing business relations; emotionally charged issues such as wrongful death, racial discrimination or sexual harassment, denial of staff privileges, medical malpractice, wrongful discharge and so on.[48]

In these types of cases, mediation can help avoid the high transactional costs associated with litigation, minimize the disruption to the parties' personal lives and employment, reduce the risks of a jury trial, and lessen the stress linked to the lengthy litigation process.

While there is a strong argument for mediating these significant cases, there is perhaps an even more compelling argument for mediating more modest, everyday disputes. The complex cases will often lean heavily on legal precedent and outcome, making them relatively easy to resolve. In

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[45] Ellen E. Deason, *The Need for Trust as a Justification for Confidentiality in Mediation: A Cross-Disciplinary Approach*, 54 U. KAN. L. REV. 1387, 1394 (2006).

[46] *Id.* at 1392.

[47] Nina Meierding, *Mediation: Staying Culturally Relevant in a Multicultural World*, MEDIATE.COM, https://www.mediate.com/articles/meierdingN1.cfm [perma.cc/NG4M-CCBP].

[48] Judith P. Meyer, *The Pros and Cons of Mediation*, 52 DISP. RESOL. J., 8, 13 (1997).

comparison, day-to-day disputes, like those between individuals and businesses, can start relatively small and easily spiral into litigation with disproportionately high costs for the magnitude of the issue. Furthermore, when these day-to-day disputes end in litigation, it generally leads to outcomes that one or all parties are unhappy with.

The process of defending or fighting for oneself, even if squarely in the right, has significant barriers that prohibit many from adequately doing so. The median household income in the United States is approximately $65,712, with median earnings for men being $52,989 and $43,215 for women.[49] Meanwhile, 16.8% of Americans report living in poverty.[50] When hourly litigation rates cost hundreds of dollars per hour and the time investment is significant,[51] even in minor disputes, defending or fighting for oneself with the assistance of counsel can easily eat up a typical household's entire annual income. This effectively prohibits the average American from legitimately considering litigation. Beyond cost, "[l]itigating in court is normally prohibitive; with long case queues, intermittent delay in the resolution of motions or claims is quite common. More importantly, litigation—with its basic rudiments of confrontation, fault-finding and judge-made resolutions, coupled with its adversarial nature—does not conform to the disposition of [diverse] peoples."[52] In contrast, mediation is fairly malleable; thus, it allows multidisciplinary professionals to make mediation both approachable and accessible for low-income and minority populations.

III. PROPOSED RECONSTRUCTION: EXPLORING THE IMPORTANCE OF CULTURAL COMPETENCY AND SOCIAL SOPHISTICATION IN THEORY AND PRACTICE

To explore the roles that cultural competency and social sophistication play for mediators and how providing parties the opportunity to see themselves in their mediator may facilitate trust, and thereby benefit resolution, it is important to first understand the current makeup of the population that mediation affects—for purpose of this Article, that is the demographics of the United States.

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[49] U.S. CENSUS BUREAU, https://data.census.gov/cedsci/profile?g=0100000US [perma.cc/75AL-E9YF].

[50] *Id.*

[51] *See How Much will my Divorce Cost and how Long will it Take?*, NOLO.COM https://www.nolo.com/legal-encyclopedia/ctp/cost-of-divorce.html [perma.cc/AWX8-6Z5V]. According to a 2019 nationwide survey that analyzed responses from verified internet users who had recently gone through a divorce, the average hourly rate for divorce attorneys was $270. *Id.* However, the amount paid did span a wide range, with eleven percent of respondents paying only $100 per hour, and twenty percent paying $400 or more an hour. *Id.*

[52] Osi, *supra* note 17, at 177–78.

At the time of writing this Article, the median age of persons living in the United States is 38.5.[53] At least 13.7%of persons residing in the United States are foreign-born.[54] However, this category is likely underreported due to residents' fear of anti-immigration sentiments directed towards them and/or the fear or risk of reporting to the United States Census Bureau and being deported.[55] Similarly, this segment of the population will likely be the most dramatically underrepresented whenever the topic of immigrant rights reenters the national debate.[56] Over 38% of persons identify as a race other than White, and 12.7% identify as having a disability (hearing, vision, cognitive, ambulatory, self-care, independent living, etc.).[57] Additionally, 88.6% of reporting persons have earned at least a high school diploma; yet only 60.2% are employed.[58] This data confirms the significant diversity of the United States.

In stark contrast, we look at who makes up the pool of those who are registered as ADR specialists. Data that reflects the gender and racial makeup of specialists is sparse, but:

> [A] 2012 survey of 743 arbitrators and mediators by the ABA Women in Dispute Resolution (WIDR) Committee found that women represented only 18 percent of arbitrators. Women were clustered in family, labor, consumer, and smaller claims, while men dominated construction, intellectual property, and complex commercial matters. The survey also found women were not adequately represented on panels. While 66 percent of those surveyed had participated in panels made up of three men, none had been involved in a three-woman panel.[59]

And in 2013, the American Bar Association (ABA) demographics only reflected a slight increase to 36% of its membership base being non-male

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[53] U.S. CENSUS BUREAU, *supra* note 49.

[54] *Id.*

[55] Matt Barreto, Chris Warshaw, Matthew A. Baum, Bryce J. Dietrich, Rebecca Goldstein, & Maya Sen, *New Research Shows Just How Badly a Citizenship Question Would Hurt the 2020 Census*, WASH. POST (Apr. 22, 2019), https://www.washingtonpost.com/politics/2019/04/22/new-research-shows-just-how-badly-citizenship-question-would-hurt-census/ [https://perma.cc/RVE9-DN2X].

[56] *Id.*

[57] U.S. CENSUS BUREAU, *supra* note 49.

[58] *Id.*

[59] Hannah Hayes, *Where Are the Women Arbitrators? The Battle to Diversify ADR*, A.B.A. (Mar. 1, 2018), https://www.americanbar.org/groups/diversity/women/publications/perspectives/2018/winter/where-are-women-arbitrators-battle-diversify-adr/ [perma.cc/7SB7-B5HZ].

identifying.[60] Prevailing diversity data in the legal industry leads to the inevitable conclusion that the percentage of minority neutrals is even lower. These percentages are comparable to the more current ABA membership as a whole.[61] In fact, the ABA conducted a Diversity and Inclusion Survey to garner a clearer picture of the profession's diversity and found that respondents "were primarily White/Caucasian (90 percent). Five percent of the respondents indicated they were African American; 2 percent Hispanic; 1 percent Asian and 2 percent 'other.'"[62] In this same study, respondents were also asked their year of birth.[63] A significant majority of the respondents, 70%, were born between 1940 and 1959.[64] Ten percent of the respondents were born before 1940, and only 20% were born after 1959.[65] While it would be reasonable to believe that these numbers have progressed as the number of women in the workforce and professional positions rise, it is common knowledge that the disparity persists.

We have identified the gap through the data that lies at the center of the lack of trust brought to light in the arbitration standoff between Jay-Z and Iconix.[66] The above data suggests that while nearly every dispute goes through mediation—whether by court order, contractually, or voluntarily—the chance of finding a mediator whom parties may be able to see themselves is challenging.[67] While diversifying the neutral pool would be a positive development, at this point, it remains a goal that perhaps depends on law schools and their diversity outreach in recruiting efforts prior to admission.[68]

Thus, we must turn our sights to what can be done in the near future. Efforts must be made to broaden the education and training made available

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[60] Gina Viola Brown & Andrea Kupfer Schneider, *Gender Differences in Dispute Resolution Practice: Report on the ABA Section of Dispute Resolution Practice Snapshot Survey*, 47 AKRON L. REV. 975, 985 (2015).

[61] *Id.* at 979.

[62] *Id.* at 978 (citing *Diversity and Inclusion ABA Member Survey*, A.B.A. 8–9 (2013), http://www.americanbar.org/content/dam/aba/administrative/diversity/ABA_DI_MemberSurveyFinal.authcheckdam.pdf [https://perma.cc/F9PE-96CT]).

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] Ben Beaumont-Thomas, *Jay-Z Lawsuit Halted Over Racial Bias in Arbitration Hearing*, GUARDIAN (Nov. 29, 2018), https://www.theguardian.com/music/2018/nov/29/jay-z-logo-lawsuit-racial-bias [perma.cc/L5DP-Z4FZ].

[67] Thomas Elkind, *To Mediate in Court or Out of Court, that is the Question*, FINANCIER WORLDWIDE (Oct. 2015), https://www.financierworldwide.com/to-mediate-in-court-or-out-of-court-that-is-the-question#.X71XMWRTnJ8 [https://perma.cc/QB9W-C5W5] ("[O]ver 90 percent of all civil cases are resolved prior to trial, and many of those cases are resolved through mediation.").

[68] *ABA Profile of the Legal Profession 2020*, A.B.A. (July 2020), https://www.americanbar.org/content/dam/aba/administrative/news/2020/07/potlp2020.pdf [perma.cc/J4KN-HNKV].

to, and perhaps required of, mediators. Diversity, inclusivity, and sensitivity training must be required within current certification programs, including historical education regarding other cultures. Those that practice mediation should receive education pertaining to race-based and gender-based trauma, and existing certification programs should require it. In fact, this training should inform the adoption of rules governing these requirements for mediators. ADR organizations should seek out groups of both culturally and racially diverse mediators and evaluate how ADR organizations can best serve an increasingly diverse population. It is estimated that by the year 2050, the United States will be a 'majority-minority' country, with White, non-Hispanic people making up less than half of the total population.[69] The time is now for our profession to prioritize education on cultural competence and its essential component—*trust*.

A. What Does Competence Mean?

Competence will undoubtedly mean something different to every person. The Oxford Dictionary defines "competence" as "the ability to do something well, successfully or efficiently."[70] Under the Model Standards for alternative dispute resolution, "competence" means "[t]raining, experience in mediation, skills, cultural understandings, and other qualities are often necessary for mediator competence."[71] While the evaluation of cultural understandings is at the forefront today, we do not have a blanket "fix."

This is not because the issues do not date back as far as mediation itself, but rather due in large part to significant events in recent years that have pulled back the curtain and forced open the proverbial window on the prevalence of systemic and inherent bias, open racism, gender inequality, and cultural injustice. It was recently reflected upon by a colleague that they distinctly recall being taught in their history classes that these were issues of the past that the United States overcame. Yet, most Americans today acknowledge such inequities still exist. It is not surprising that many victims of discrimination lack trust that most mediators have the cultural competence and social sophistication needed to allow parties in mediation to feel heard, seen, valued, and understood when schools teach students that it was only an issue of the past.

So, what do cultural competence and social sophistication mean? "The term 'culture' is imbued with the historical realities of power, race,

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[69] Dudley Poston & Rogelio Saenz, *The US White Majority Will Soon Disappear*, CHI. REPORTER (May 16, 2019), https://www.chicagoreporter.com/the-us-white-majority-will-soon-disappear-forever/ [perma.cc/4V2Y-X5CB].

[70] *Competence*, OXFORD ENG. DICTIONARY (2d ed. 1989).

[71] THE MODEL STANDARDS OF CONDUCT FOR MEDIATORS § IV(A)(1) (AM. BAR ASS'N 2005).

superiority, and colonialism, which can result in relegating some to the position of 'other.'"[72]

> Researchers have identified three interacting primary components of a culture: (1) material culture, which depends on the ecosystem; (2) social culture, which is the arrangement of familial, political, and economic groupings; and (3) ideological culture, which is the underlying belief system of a people. Conflicts fitting into these three categories, so-called "culture wars," have been fought over such issues as family, politics, and education, and "stem from deep and incompatible differences over the sources of moral authority." Putting such conflicts into these three categories helps break down the many cultural nuances surrounding dispute resolution into a much more manageable framework. Appreciating elements within all three cultural components is essential to understanding the larger context in which you are operating.[73]

Historically, the legal profession has been one of the least diverse professions in the nation, and this continues to be the case.[74] "Because the public's perception of the legal profession often informs impressions of the legal system, a diverse bar and bench create greater trust in the rule of law."[75] These negative perceptions of the legal profession impact the "public confidence in our system," says Thomas W. Ross, Professor of Public Law and Government at the University of North Carolina at Chapel Hill.[76] As such, enhancing diversity and inclusion is a primary goal in the legal community.[77] Since the mediation process is typically tied to a non-diverse

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[72] Verlyn F. Francis, *Infusing Dispute Resolution Teaching and Training with Culture & Diversity*, 33 OHIO ST. J. ON DISP. RESOL. 171, 191 (2018).

[73] Amanda Stallard, *Joining the Culture Club: Examining Cultural Context When Implementing International Dispute Resolution*, 17 OHIO ST. J. ON DISP. RESOL. 463, 471 (2002) (quoting E. FRANKLIN DUKES, RESOLVING PUBLIC CONFLICT: TRANSFORMING COMMUNITY AND GOVERNANCE 167 (1996)).

[74] Deborah L. Rhode, *Diversity and Gender Equity in Legal Practice*, 82 U. CIN. L. REV. 871, 871 (2014) (citing ELIZABETH CHAMBLISS, MILES TO GO: PROGRESS OF MINORITIES IN THE LEGAL PROFESSION ix (2004)) ("According to the American Bar Association (ABA), only two professions (the natural sciences and dentistry) have less diversity than law; medicine, accounting, academia, and others do considerably better.").

[75] *Diversity in Law: Who Cares?*, A.B.A. (Apr. 30, 2016), https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/articles/2016/spring2016-0416-diversity-in-law-who-cares/ [perma.cc/4ZTY-MG6W].

[76] *Id.*

[77] *See id.*; Edward Kang, *Diversity and Its Impact on the Legal Profession*, LAW PRAC. TODAY (Sept. 14, 2016), https://www.lawpracticetoday.org/article/diversity-impact-legal-profession/ [perma.cc/7M3U-ELS7].

court system that does not always treat people fairly and that people do not always trust, it is often a challenge for people to believe in mediation.

It would, of course, be misplaced and irresponsible to broadly state that those actively involved in the field of ADR are not culturally competent. It may be that a person born in 1930 will have a different level of familiarity and comfort with today's evolved definition of competence than someone born in 1950, and that person may have a different understanding from someone born in 1980 or 2000. While the United States is evolving quickly, it is not something that the legal profession can quickly adapt to, as it has been rooted in long, thought-out approaches and reasoning. Competency must be a fluid concept with the intent that, when undertaking a journey to cultural and societal competence, there is no end, only continuous, relentless effort and progress.

B. With an Openness to Learning, Mediators Can Evolve.

We live in a time and place where we are connected to just about everyone in the world. People are used to seeing others from different regions, different cultures, and different walks of life every day through television, social media, and the internet. What was once foreign or unfamiliar is no longer so different. Now more than ever, constant engagement with diverse populations is considered the norm for many of us.[78]

This sentiment carries over into many people's everyday lives. For example, while a particular community may not be racially diverse, it may be religiously so. While a community may not be financially diverse, it may be in terms of ethnicity. While a community may not be diverse in sexual orientation, it may be in age. One imagines that it would be quite rare to find a community in the United States in which a person does not encounter others who differ from them in some way.[79] This by no means applauds these lackluster levels of diversity. It does, however, evidence growth, which should be taken into account, as it impacts those who live in our

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[78] *See* William Frey, *The Nation in Diversifying Even Faster than Predicted, According to New Census Data*, BROOKINGS (July 1, 2020), https://www.brookings.edu/research/new-census-data-shows-the-nation-is-diversifying-even-faster-than-predicted/ [https://perma.cc/3HUQ-CF6Q]. *But see* Aaron Williams & Armand Emamdjomeh, *America is More Diverse than Ever—but Still Segregated*, WASH. POST. (May 10, 2018), https://www.washingtonpost.com/graphics/2018/national/segregation-us-cities/ [https://perma.cc/BP5R-H2CG].

[79] Using racial diversity as an example, given that it tends to be the most front-facing issue, large cities are the most racially diverse places in America. Casey Leins, *The 10 Least Racially Diverse Big Cities in the U.S.*, U.S. NEWS (Jan. 22, 2020), https://www.usnews.com/news/cities/slideshows/the-10-least-racially-diverse-big-cities-in-the-us [https://perma.cc/K42U-Q4UL]. This trend continues to grow with nearly 70% of the country's largest cities being more racially diverse than they were in 2010, according to a U.S. News & World Report analysis of data from the U.S. Census Bureau. *Id.*

communities, including the very mediators we hope to encourage with education and a positive trend towards awareness.

By a mediator implementing both their own education and relaying their understanding regarding a party's position, a neutral mediator invites the participants to see their efforts.

> The advantage of alternative dispute resolution in a cultural context is that it examines the interests underlying the parties' positions in order to evaluate the needs, concerns, and desires of each side. Researchers realize that cultural constructions of personhood, conflict (specifically, its genesis, management, and resolution), and rationality are factors crucial to understanding how different cultures interpret and respond to conflict situations. One way to analyze such factors is through high and low "context cultures." "Low context" cultures like the United States, Canada, and central and northern Europe are characterized by individualism, heterogeneity, and overt communication. "High context" cultures like Asian and Latin American countries, on the other hand, focus on collective identity, homogeneity, and covert communication.[80]

Some authors have written about cultural differences that can affect mediation, which provides foundational guidance for what the education should include. For example, mediation in Latino culture has been,[81] and should continue to be, studied given the significant presence of the Latino culture in the United States. Persons identifying as Latino currently make up at least 18.5% of the U.S. population,[82] which is likely significantly under-reported, given the shared border with Mexico, the continuing politically

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[80] Stallard, *supra* note 73, at 472.

[81] The decision to broadly use the word Latino originates from the following direction: "We prefer Latino to Hispanic because the former is the term in common use among group members themselves whereas the latter was imposed by governmental authorities for statistical purposes." Howard H. Irving, Michael Benjamin, & Jose San-Pedro, *Family Mediation and Cultural Diversity: Mediating with Latino Families*, 16(4) MEDIATION QUARTERLY 336 (1999) (citing to J.W. GREEN, CULTURAL AWARENESS IN THE HUMAN SERVICES: A MULTI-ETHNIC APPROACH. (2d ed. Boston: Allyn & Bacon, 1995)).

[82] *Quick Facts United States*, U.S. CENSUS BUREAU (July 1, 2019), https://www.census.gov/quickfacts/fact/table/US/RHI725219 [perma.cc/59RS-BNNA].

fueled border crisis,[83] and the fear of reporting to the U.S. Census Bureau.[84] The need is further evidenced, as mediation is often used amongst business owners, and in employment, landlord-tenant, and customer matters, among other fields. Latino-owned businesses jumped an astounding 46.3% between 2007 and 2012, with Latino entrepreneurs owning 12% of all businesses in 2012, which was up 8.3% from 2007.[85] As such, it would likely be less effective for a mediator to conduct a mediation that involves a Latino party without first understanding the cultural context of this group.

Latino families "tend to display a constellation of sociodemographic attributes: Spanish as a mother tongue; immediate or

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[83] President George H. W. Bush approved the initial fourteen miles of fencing along the San Diego-Tijuana border; construction began in 1990 and was completed in 1993. Susan Montoya Bryan, *Past Projects Show Border Wall Building is Complex, Costly*, AP NEWS (Jan. 12, 2019), https://apnews.com/article/ab1b07e15e6f4e9a9274b576ff3a1d45 [https://perma.cc/6D4J-D3WM]. President Donald Trump renewed the desire to build a more substantial wall, making it an election platform and party battle cry for his election in 2016, with promises that an expansive wall would be built, and that Mexico would pay for it. *Id. See also* Nick Miroff & Adrian Blanco, *Trump Ramps Up Border Wall Construction Ahead of 2020 Vote*, WASH. POST (Feb. 6, 2020), https://www.washingtonpost.com/graphics/2020/national/immigration/border-wall-progress/ [perma.cc/HQ6A-UXDM].

[84] *ICE Details How Border Crisis Impacted Immigration Enforcement in FY 2019*, U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/features/ERO-2019 [perma.cc/Y635-Q4G5]. ICE's overall removals have steadily increased.

> [F]rom FY 2018 to FY 2019, the portion of removals resulting from CBP apprehensions increased significantly during this time period, as a direct result of the border crisis. In FY 2019: ICE removed 267,258 individuals, an increase from the 256,085 removals in FY 2018. Among those removed in FY 2019, 85% had previously spent time in ICE detention, demonstrating its continued importance for the removal process. ICE removed more than 5,700 aliens identified as family unit members, which represents a 110% increase in removal of family unit members compared to FY 2018. 91% of those ICE initially arrested in the interior and subsequently removed had criminal convictions or pending criminal charges at the time of arrest, demonstrating ICE's continued efforts to prioritize public safety in the interior despite resource constraints.

Id.

[85] *Hispanic-Owned Businesses on the Upswing*, MINORITY BUS. DEV. AGENCY (2016), https://archive.mbda.gov/news/news-and-announcements/2016/12/hispanic-owned-businesses-upswing.html [perma.cc/6ST8-GRPW].

> In contrast, the total number of all U.S. firms increased 2.0 percent during the same period, from 27.1 million to 27.6 million. Hispanic business ownership is defined as having people of Mexican, Puerto Rican, Cuban or other Hispanic origin (such as Dominican or Salvadoran) owning more than 50.0 percent of the stock or equity in a nonfarm business operating in the United States. Hispanics owned 12.0 percent of all businesses in 2012, up from 8.3 percent five years earlier.

Id.

ultimate origin in Mexico, Cuba, Puerto Rico, Central or South America, or Spain; faith in Roman Catholicism; and a preference for large families."[86] The authors go on to explain that this depiction of Latino families supports a number of implications for mediation in recognition of the unique qualities of the Latino culture: "[e]fforts at power balancing and other innervations may involve a variety of methods. Among Latino families, the notion of *indirectas* recommends that the practitioner avoid confrontational techniques and prefer more subtle and indirect ones, such as allusion, provers, folk tales, storytelling, humor metaphor, and reframing."[87] Other cultural facets that should be taken into consideration are the frequent use of nonverbal cues due to the high-context character of the Latino culture,[88] importance of establishing rapport, beyond trust,[89] and respect for hierarchy,[90] all of which can significantly impact the success, or lack thereof, of mediation.

As another example, mediation in the African American and Black community has been studied and should continue to be studied given the significant presence of the African American and Black culture in the United States. Persons identifying as "Black" or "African American" currently make up at least 13.4% of the population.[91] Similarly, Black-owned

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[86] Irving et al., *supra* note 81, at 332.

[87] *Id.*

[88] *Id.* at 334.

> The high-context character of the Latino culture means that much of the message in interpersonal communication is encoded non-verbally. For the mediator accustomed to the low-context character of the Anglo culture (wherein most content is contained in verbal exchange), sudden transition to the Latino culture is unmanageable difficult. For example, mediators should be aware the silence, guarded posture, and avoidance of eye contact-especially on initial contact-are in keeping with the Latino nonverbal communication style in the presence of an authority figure and imply neither resistance nor lack of cooperation.

Id.

[89] *Id.*

> Among Latino families, rapport is likely to involve more than merely developing trust. It means moving from the status of outside to that of insider, with whom private family matters may be discussed. (Falicov, 1996) To that end, practitioners need to develop a personal relationship with key family members. Such personal involvement places demands on oneself not normally experienced in dealing with white clients, including issues of self-disclosure, the boundary between professional and personal, and established notions of professional expertise having to do, for example, with public touching and displaying affect.

Id. (citing to C. J. Falicov, *Mexican Families* in M. MCGOLDRICK, ETHNICITY AND FAMILY THERAPY (J. Giordana, & J. K. Pearce (eds.), 2d ed., 1996).

[90] *Id.*

[91] *Quick Facts United States*, *supra* note 82.

businesses jumped 34.5% between 2007 and 2012.[92] Again, understanding the larger cultural context for the Black community is important before undertaking a mediation involving one or more African American or Black participants.

> While modern American ADR is heavily linked to the legal and judicial systems, empirical studies have demonstrated that African-Americans are generally less trustful of these systems, primarily as a result of the historic experiences of human slavery, racial discrimination, human and civil rights violations, and Jim Crow practices, all of which were sanctioned and protected by law. Consequently, for many generations, African-Americans could not look to the courts to address the injustices and discriminatory treatment occurring in their lives and in the lives of their children and other loved ones. . . . Additionally, African-Americans are more likely to "discuss core problems first with extended family, close family friends, and spiritual leaders . . . before conferring with professionals," including mediators or other ADR professionals. On the other hand, one of the prevalent ways African-American communities have traditionally used courts is to establish and defend collective rights of African-Americans and others. The American civil rights movement used the courts as a means of gaining collective rights, protection, and justice.[93]

In evaluating these two examples, of which there are many more, the authors found commonalities that can further be applied to other racial minorities.

> The findings identified universal barriers that applied to anyone, regardless of race or ethnicity. However, these barriers were more detrimental for *African-Americans,*

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[92] *Black Owned Business Statistics*, BLACK DEMOGRAPHICS, https://blackdemographics.com/economics/black-owned-businesses/ [perma.cc/L66W-268D].

> Black owned businesses in the United States increased 34.5% between 2007 and
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> 2012 totaling 2.6 million Black firms. More than 95% of these businesses are mostly sole proprietorship or partnerships which have no paid employees. About 4 in 10 black-owned businesses (1.1 million) in 2012 operated in the health care, social assistance; and other services such as repair, maintenance, personal and laundry services sectors.

Id.

[93] Janice Tudy-Jackson, *"Non-Traditional" Approaches to ADR Processes that Engage African-American Communities and African-American ADR Professionals*, 39 CAP. U. L. REV. 921, 931–33 (2011).

> *Latino-Americans, and Asian-Americans.* These barriers included: (1) a lack of clear entry points or career paths for the ADR profession; (2) ambiguity about ADR credentials; (3) a lack of mentors and role models from the underrepresented racial and ethnic groups; (4) a heavy reliance on volunteerism, particularly for mediators; (5) a "[l]ack of public knowledge about ADR" generally; and (6) the domination of the ADR field by the legal profession. The study also identified barriers, which are specific to African-Americans, Latino-Americans, and Asian-Americans collectively. Some of these barriers included that: (1) the ADR profession is a gated community where it is very difficult to gain information or experience; (2) there is an "'old boys' network" in the ADR field; (3) mediation still relies heavily on volunteers who receive little or no compensation, which reminds African-Americans of slavery and exploitation; (4) African-American, Latino-American, and Asian-American families and communities place high value on job security; and (5) client and institutional biases still exist.[94]

That said, some barriers may be further rooted in culture itself.

> [T]he research and policy literature has also shown that culture can affect who is considered to be a legitimate mediator and that the Anglo-American model of a trained, neutral mediator may not meet the needs of some cultures. Instead, in some cultures, a mediator who comes from within the social network of the parties may be preferred. Age may also be a factor. Some cultures may reject a mediator who is younger than the parties.[95]

While education related to cultural competence is crucial, neutrals must remember that this knowledge should never be applied proscriptively. For example, it would be improper for a mediator to become educated on what cultural and societal competency means today but then to use that information in an attempt to course-correct a litigant that may present differently than their expectations. This may, in fact, manifest as unconscious bias and create a rift between the neutral and the party (or parties) who perceive the existence of said bias.

Unconscious biases are directly correlated to "unintentional racism," that is, "racism that is usually invisible even *and especially* to those

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[94] *Id.* at 935 (emphasis added).

[95] Steven Weller, John A. Martin & John Paul Lederach, *Fostering Culturally Responsive Courts*, 39 FAM. CT. REV. 185, 189 (2001).

who perpetrate it" simply because no person wants to believe that they are capable of racist acts.[96] This unconscious bias can affect the relationship and, if a neutral's training differs from how a mediation plays out in real-time, it is more effective for the neutral to internally process their learnings as it relates to the current parties, while validating that they see the parties and hear what they are saying. Margery B. Ginsberg and Raymond Wodkowski warned that:

> [U]nless educators understand their own culturally mediated values and biases, they may be misguided in believing that they are encouraging divergent points of view and providing meaningful opportunities for learning to occur when they are in fact repackaging or disguising past dogmas. It is entirely possible to believe in the need for change and therefore learn new languages and techniques, and yet overlay new ideas with old biases and frames of reference. It is possible to diminish the potential and the needs of others at the most subconscious levels and in the most implicit ways without any awareness of doing so. Mindfulness of who they are and what they believe culturally can help them to examine the ways in which they may be unknowingly placing their good intentions with a dominant and unyielding framework—in spite of the appearance of openness and receptivity to enhancing motivation to learn among all students.[97]

In today's world, diversity represents reality. For a historically White and male-dominated field to adjust to the changing landscape, it is important for mediators to spend time educating themselves about different cultures and building trust with the litigants in their community.

C. Success Requires Trust

Generalized trust in other Americans has never been so low, and it is tied to the structural forces at play with the ever-present race and gender gap.[98] Yet, with competency comes trust, and mediation can only be successful if trust is present. Both mediators and parties must be invested in the process of mediation, trust that it can work, and expect that the mediator will do their job by acting in a truly neutral capacity. This neutrality requires that the mediator allow each party to feel that they are treated equally and that they are seen, valued, and heard; an inkling of partiality can derail a

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[96] Jean Moule, *Understanding Unconscious Bias and Unintentional Racism*, 90 PHI DELTA KAPPAN 321, 320–26 (2009).

[97] Francis, *supra* note 72, at 221.

[98] *See generally* Rima Wilkes, *Re-thinking the Decline in Trust: A Comparison of Black and White Americans*, 40 SOC. SCI. RSCH. 1596 (2011).

matter in an instant. Unfortunately, this is an uphill battle at the time of drafting this Article, and probably at the time you are reading it—trust is not easily earned, it is highly politicized, and in many instances, it has been obliterated by past life experiences. Even still, with the recognition of the importance and value in this trust, it can and must be established.

Trust has been described "as the willingness to be vulnerable under conditions of risk and interdependence."[99] It has also been described as positive expectations based on the behavior of another under conditions of vulnerability and dependence.[100] In the legal profession, there are few more vulnerable places to be than in mediation. After all, the parties are presumably hopeful for resolution if they are present in good faith and are appealing to one another personally.

In mediation, parties are in control. While the mediator engages in conversation and facilitates or conveys positions, most of the mediation is often one party speaking to another. The outcome in mediation truly lies in the hands of the parties who must divulge all that they can, entrusting it to their mediator, and then work towards a resolution that they hope will be understood and accepted by the other party. Conflicts themselves often arise from "a lack of understanding about different needs," but resolutions usually require feelings of security and respect.[101] Security again comes back to feeling seen, heard, and valued, as well as emphasizing one's personality and belief system, the norms that they experience in their life, and the experiences they have had.

> An individual's ability to trust another is based on one of three elements, the first of which is rooted in one's personality—the belief system developed through one's life experiences related to trust. Second, it may be based on a set of rules and norms established by institutions/society. Third, trust may be based on experiences within a given relationship.[102]

It should be no surprise that mediation can often go awry if trust is not established early on. As discussed, this necessitates a certain level of cultural and emotional competence.

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[99] Denise M. Rousseau, Sim B. Sitkin, Ronald S. Burt, & Colin Camerer, *Not So Different After All: A Cross-Discipline View of Trust*, 23 ACAD. MGMT. REV. 393, 395 (1998).

[100] Larue Tone Hosmer, *Trust: The Connecting Link Between Organizational Theory and Philosophical Ethics*, 20 ACAD. MGMT. REV. 379, 390 (1995).

[101] Jeanne Segal, Lawrence Robinson, & Melinda Smith, *Conflict Resolution Skills*, HELPGUIDE, https://www.helpguide.org/articles/relationships-communication/conflict-resolution-skills.htm?pdf=13749 [perma.cc/LP4L-MFME].

[102] R.J. Lewicki & C. Wiethoff, *Trust, Trust Development, and Trust Repair*, *in* THE HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE 87 (M. Deutsch & P.T. Coleman (eds.), 2000).

The crux of reconstructing how we mediate in the United States depends on competency and growth, so we now look at the accompanying shortcomings of failing to take the active steps addressed in this Article.

While more accessible than a traditional litigation path, barriers—perceived or otherwise—between the litigants and the mediators themselves still exist, and the perception that conscious or unconscious bias concerning cultural, personal, and social differences change how a mediator handles a mediation, affects participants. Minority participants in ADR "are more apt to participate in processes which they believe will respond to reasonable efforts . . . [and] less likely to participate in proceedings where the results are random and unpredictable."[103]

Without education and training in vital areas of human interaction and trust, it is uncertain how parties will feel in the mediation setting. The Model Standards of Mediation require that a mediator "should not act with partiality or prejudice based on any participant's personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason." While ethical standards and guidelines consider mediators' conscious behaviors, implicit bias is not addressed by any ethical codes.[104] Implicit bias is nevertheless an enduring issue that can also undermine the efforts being made in mediation.

> Being socialized and living in the dominant culture often lessens awareness that beliefs and behaviors reflect a particular racial group, ethnic heritage, sexual orientation, or gender affiliation. A dominant group can so successfully project its way of seeing social reality that its view is accepted as common sense, as part of the natural order, even by those who are disempowered or marginalized by it.[105]

Professor Sharon Press, Director of the Dispute Resolution Institute at Mitchell Hamline School of Law, wrote that the treatment of minority claimants in mediation suggests evidence of an ethnic disparity. "Even when 'case-specific and repeat player variables' were accounted for, minority male and female claimants received significant[ly] lower [settlements]."[106] However, this only occurred "when at least one [White] mediator mediated the case."[107] Evidence suggested that both White and minority respondents were more willing to legitimize White claimants' monetary claims.[108] That said, "[White] mediators were more likely to

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[103] Press, *supra* note 44, at 827.
[104] Blankley, *supra* note 38, at 356.
[105] Francis, *supra* note 72, at 219.
[106] Press, *supra* note 44, at 829.
[107] *Id.*
[108] *Id.*

assume that monetary claims brought by [White claimants] were nonnegotiable while claims by minorities were more open to nonmonetary resolutions or negotiations that minimized monetary outcomes."[109] This may have been, in part, because "as compared with [White] claimants, minority claimants had broader goals for their mediations, looking to achieve more than a simple monetary award."[110] While a third party cannot speak to the cultural and social competency of the mediators in these studies or the trust that existed in those mediations, it is clear that there is a common thread when minorities are a party to mediation—on average, White claimants ended up doing better in mediations than minority claimants.

This highlights another issue that perceived implicit bias might pose for those who have experienced race-based and gender-based trauma. It is not uncommon for diverse parties to have experienced such trauma.[111] Parties may also have invisible disabilities, such as Post-Traumatic Stress Disorder (PTSD) due to domestic violence or rape; mental differences (e.g., varying levels of autism); anxiety disorder(s); or type(s) of depression; the list goes on. Any such instance of trauma can make it difficult for those persons to trust moving forward and may lead to increased psychiatric and psychophysiological symptoms. Addressing such trauma may require acknowledging the trauma and sharing the trauma, grief, anger, shame, and resistance strategies.[112] While mediators are not a substitute for mental health practitioners,[113] they can still, through education and effort, conceptualize survivors' symptoms and work to buffer the impact of said trauma. In instances where trust has been broken by past encounters, mediators should work towards repairing trust.[114] When parties are unable

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[109] *Id.* at 830.

[110] *Id.*

[111] *See* Jasmin Llamas, Robyn Gobin, Shannon Gustafson, Kathryn Hendricks, Danielle Marinsik, Rebecca Marquez, Khoa Nguyen, Marissa Sia, Lauren Lundstedt, Supriya Misra & Tanisha Thelemaque, *Trauma and Posttraumatic Stress Disorder in Ethnic Minorities*, TRAUMA PSYCH. (2006) (reporting 76.37% of Black individuals, 66.38% of Asian individuals, and 68.17% of Hispanic individuals are exposed to trauma in their lifetime); Dawne Vogt, *Research on Women, Trauma and PTSD*, U.S. DEP'T VETERANS AFFS., https://www.ptsd.va.gov/professional/treat/specific/ptsd_research_women.asp [perma.cc/WTN7-PUKE] ("[W]omen experience PTSD at two to three times the rate that men do. U.S. prevalence estimates of lifetime PTSD from the National Comorbidity Survey Replication are 9.7% for women and 3.6% for men.").

[112] Lisa Ferentz, *How to Respond When Trauma is Revealed*, PSYCH. TODAY (Feb. 26, 2015), https://www.psychologytoday.com/us/blog/healing-trauma-s-wounds/201502/how-respond-when-trauma-is-revealed [perma.cc/Z3G8-QJRK] (discussing the uses of disclosing information to manage traumatic experiences in an individual's life).

[113] *See generally* Raymond Scurfield & David W. Mackey, *Racism, Trauma and Positive Aspects of Exposure to Race-Related Experiences*, 10 J. ETHNIC & CULTURAL DIVERSITY SOC. WORK 23 (2001).

[114] *See generally* LEWICKI & WIETHOFF, *supra* note 102, at 4.

to conform to set expectations, trust is violated, and the result ultimately depends upon the type of relationship that has been built. Reactions may range from mild annoyance at the unmet expectation to angry and upset feelings, as one party may feel a direct challenge to their values and beliefs. "This can be corrected by the parties discussing the violation and working together to solve the problem."[115]

Repairing trust takes time because parties must slowly rebuild what has broken. It may be easier to begin by working to "manage distrust" by:

> (1) addressing the behaviors which created distrust; (2) having each person responsible for a violation of trust apologize and explain the violation; (3) having each party negotiate expectations for one another and agree to the terms; (4) establish evaluation procedures that can be agreed upon by both parties; and (5) helping parties to establish alternative ways to get needs met.[116]

Only once mediation practitioners earn the trust of the people they serve and embark on the road of educating themselves in cultural and societal differences can there be a bridge towards creating a safe mediation space.

IV. IMPLEMENTATION: LOOKING FORWARD

As previously described, the lack of diverse neutrals and awareness around gender and cultural differences and non-visible disabilities in administering all forms of ADR affects the likelihood of resolution. This void means clients, mediators, and the American justice system are missing out on the benefits that mediation can offer. Yet, this void gives us an opportunity for growth. The theory, process, and need for mediation are widely accepted.[117] Most mediators work hard to do the best they can for both parties. However, some inherent issues reduce the effectiveness of mediation and the trust of the parties.

While mediator diversity will hopefully increase substantially, further training in cultural and societal differences, a focus on listening to establish trust with diverse parties, and rethinking accepted attributes of mediation to make parties more comfortable, are necessary. Some solutions, such as the location and medium for mediation, are easily achievable ways to make mediation more acceptable and desirable. With busy court dockets across the country, improving mediation and making it more accessible may change how people approach dispute resolution.

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[115] *Id.* at 102.
[116] *Id.* at 103.
[117] *See, e.g.*, Meierding, *supra* note 47; Meyer, *supra* note 48; Segal et. al., *supra* note 101.

A. Diverse Pool of Mediators

It is without question that the mediator pool lacks diversity—and this extends to the legal profession in its entirety. This is an area that should be at the forefront of every legal institution's mind. Unsurprisingly then, "even though modern American ADR has been growing since the late 1970s, racial and ethnic disparities remain associated with the field of ADR, especially with respect to the underrepresentation of African-Americans, Latino-Americans, Asian-Americans, and Native-Americans among ADR professionals."[118] When curating a mediator pool that will best provide for those it is meant to serve, it is imperative to think broadly. The identity of the mediators is important.

> In the Anglo-American model of mediation, the mediator must be neutral, have no connection to either party, have undergone extensive training, and in some jurisdictions have certification from the court. In the Latino model, status may be more important than training or certification. The most suitable mediators might be individuals who are respected in the Latino community, such as local politicians, community organizers, counselors, clergymen, attorneys, or respected elders. It might even be desirable for the mediator to be familiar with the family. Grandmothers, aunts, older sisters, cousins, and godmothers might also play a more active role. In addition, more Spanish-speaking mediators are needed. Spanish-speaking attorneys could be trained as mediators, to work pro bono.[119]

As a colleague so aptly wrote in her Article evaluating court-provided mediators: "who the mediator is matters."[120] We must consider that it matters for many reasons. First, a more diverse mediator pool will allow minority parties to "feel more empowered by seeing other minorities in positions of importance."[121] Second, the larger pool of mediators will allow mediators to learn from each other and increase their cultural sensitivity.[122] And finally, "the greater the diversity of the mediator pool, the more society will be able to study the impact of diversity on outcomes in mediation."[123]

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[118] Tudy-Jackson, *supra* note 93, at 924–25.
[119] Weller et al., *supra* note 95, at 195.
[120] Press, *supra* note 44, at 841.
[121] *Id.*
[122] *Id.*
[123] *Id.*

B. Training

Given the reality that mediation will often and increasingly involve diverse parties, "court programs should include requirements for diversity training[,] not only when seeking to become qualified on a court roster[,] but also as a continuing requirement."[124] Ultimately:

> [H]uman needs are the center of all disputes or conflicts and those five basic needs are communication, emotions, values, history and the structures within which interactions take place. Concepts of culture include four of those basic needs (communication, emotions, values and history). In other words, disputes or conflicts are intertwined with culture. Therefore, knowledge of culture is essential to assisting parties to arrive at settlements of disputes.[125]

Accordingly, establishing a reasonable level of training for those who wish to be listed as mediators on a court roster would invariably encourage those in the profession to acknowledge these issues and to educate themselves therein.

However, the substance of cultural and societal training must be examined closely. For example: How does implicit bias affect mediation? What are the criticisms of mediation from people of different cultures, experiences, or perspectives? What do these groups believe will give them the needed trust for mediation? How does a mediator bridge different cultures, and is it possible to do given the setting or time considerations? Is there a need for more than one mediator in these situations? These are important questions; if these approaches can be further developed in a manner that increases trust in the process, mediation has the potential to significantly reshape how a large percentage of disputes are addressed.

C. Facilitate Conversation Before Adversarial Interaction Begins

There are few things more feared than litigious individuals or waking up entwined in a legal battle. It is no secret that most people do not like lawsuits.[126] They are strenuous, exhausting, depleting, mentally trying, time-consuming, and they can go on for years. Many courts require some

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[124] *Id.* at 843. For example, the Florida Supreme Court requires mediators who are certified to complete "a minimum of one hour of diversity/cultural awareness education [during] each two year renewal cycle." *In re* Procedures Governing Certification of Mediators, Fla. Admin. Order No. AOSC08-23 (June 30, 2008), http://www.floridasupremecourt.org/clerk/adminorders/2008/AOSCO8-23.pdf [https://perma.cc/Q4YH-ZLHC].

[125] Francis, *supra* note 72, at 173.

[126] Russel Goldman, *Obsessed With Lawsuits: Psychology, Not Justice or Cash, Makes Serial Suers File Countless Suits*, ABC NEWS (July 31, 2008), https://abcnews.go.com/Health/story?id=5483226&page=1 [perma.cc/7TU6-Q27B].

type of alternative dispute resolution process, such as mediation or arbitration, before trial, but the selected resolution process often takes place long after the parties have engaged in discovery, motions, depositions, and other steps of the adversarial system.[127] While attorneys will often say that they need all the facts before they engage in dispute resolution, this seems overbroad, as the parties' positions in many cases are well understood at the outset. The parties simply disagree about what the outcome should be. A requirement to mediate before, or shortly after, filing a lawsuit will allow the parties an opportunity to address their different views in a less adversarial way. Perhaps, mediation can be normalized as not only a respectable form of facilitated resolution but a preferred one, allowing for conversations between people in an effort to find middle ground.

> For example, a culturally competent mediator may allow extended social interchange prior to beginning the mediation to build relationships, or allow a party to convey his experience through storytelling or parables that initially might appear irrelevant to the other disputant. By summarizing and restating, the mediator may be able to draw meaning from the communication that can be understood by the other side. Culturally competent mediators will allow storytelling or overlapping styles of communication that would not be tolerated in court or arbitration.[128]

It goes against everything legal professionals are taught about burying emotion, yet there is strength in the humanization of parties involved in mediation. Given that most lawsuits settle prior to trial, there is no reason to doubt that a significant number of cases may settle if mediation is required at the outset.

D. Location

It is time to normalize mediation being held where the parties are most comfortable. There may be cultural reasons for comfort, as well as personal reasons. If a party feels anxious, fearful, out of place, or at a disadvantage because of the location of the mediation, trust is missing from the outset. For many, being in grand buildings can be anxiety-inducing. For example,

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[127] *See* DEP'T. OF JUST., *ADR in the Federal District Courts—District-by-District Summaries* (Mar. 2016), https://www.justice.gov/archives/olp/file/827536/download [perma.cc/PMA8-2HDA] (listing federal district courts and their policies regarding mandatory or voluntary mediation). *See also* Minn. Gen. R. Prac. 114.

[128] Gold, *supra* note 9, at 313–14.

> The downtown courthouse . . . is an imposing place for a non-English-speaking litigant. Fear of the courthouse may in part explain why so few Spanish-speaking litigants use the mediation program. For the Latino community, the mediations might be held in the community rather than at the downtown court location.[129]

A welcomed alternative may be a community center that is tailored to the persons who frequent it, or an office that perhaps lacks grandeur but offers comfort. Such a building could be situated in an easily accessible place that lends to a feeling of inclusion. A benefit to mediation is that it can be held in nearly any location that is suitable to the privacy required by all participants, and thus it would be prudent for the legal professionals involved to consider the cultural aspects at play and find a neutral location befitting of all parties.

E. E-mediation

The year 2020 challenged us all to become learned in the ways of online communication. It forced us to discover how to pivot, communicate, provide comfort from afar, establish rapport, and conduct confidential work in virtual settings. While uncomfortable for many, it would be naïve to think that this format is going away any time soon. Even as the United States slowly re-opens, many businesses have seen the benefit of working remotely and are normalizing the practice.[130] It will be unsurprising if many professionals opt to remain remote for all or a portion of their work.

E-mediation has, at least temporarily, become the norm. As with depositions, courts have generally not required in-person mediations during

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[129] Weller et al., *supra* note 95, at 195.

[130] In May 2020, "Twitter, Inc., has said that employees have the option of never coming back to the office to work." Twitter is among "[a]t least six prominent tech companies [that] are considering permanently moving a large slice of their workforces to work-from-home status." Jon Swartz, *Work-From-Home Productivity Pickup has Tech CEOs Predicting Many Employees Will Never Come Back to the Office*, MKT.WATCH (May 30, 2020), https://www.marketwatch.com/story/work-from-home-productivity-gain-has-tech-ceos-predicting-many-workers-will-never-come-back-to-the-office-2020-05-15#:~:text=TWTR%2C%20%2B2.03%25%20has%20said,0.71%25%20and%20Slack%20Technologies%20Inc [perma.cc/9MXC-8SYF]. As of September 2020, the trend has continued and spread to additional industries including insurance, despite the common knowledge that likely every major medical institute worldwide is working towards a vaccine to abolish the virus. Adobe, Amazon, Capital One, Microsoft, Nationwide Insurance, PayPal, Upwork, and Zillow are among the twenty-seven companies who have said that they plan to make a remote-work option a permanent benefit. Emily Courtney, *27 Companies That Have Switched to Long-Term Remote Work*, FLEXJOBS (Sept. 8, 2020), https://www.flexjobs.com/blog/post/companies-switching-remote-work-long-term/ [perma.cc/65CU-LPDL].

the COVID-19 pandemic.[131] Online mediation allows the mediator to adapt the process to address the particular needs of the disputants.

> In addition to enhancing some of the benefits of traditional mediation, there are also advantages to resolving disputes over the Internet: 'The process will allow for greater flexibility, more creative solutions and quicker decisions.' In particular, the benefits of cyber-mediation discussed below include cost savings, convenience and the avoidance of complicated jurisdictional issues.[132]

In addition to offering participants ease of use:

> It may also be argued that more thoughtful, well-crafted contributions result from the ability of the parties to edit messages prior to sending them: "Asynchronous Internet communications have the advantage of being edited 'best' communications in sometimes contrast to 'first' (often impulsive) responses that can take place in real time face-to-face mediation discussions."[133]

Furthermore, "[t]he amount of idle time that disputants experience is similarly reduced because, in contrast to traditional mediation, the mediator can devote time to one party without wasting the time of the other party, who would traditionally sit around waiting for the next mediation stage."[134]

Importantly, e-mediation provides both parties with a safe space to have an open and honest conversation from the comforts of each individual's choosing.

> Online mediation also has the advantage of traditional mediation, but allows for greater ease of information delivery. The parties and mediator do not have to be in the same location, state, or even country; the mediation can occur at any time; and the parties can participate from any location. Online mediation may be particularly appealing to those who conduct business online and have a multi-

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[131] *See* Jennifer Johnston Terando, *Online Dispute Resolution: The Time is Now for Online Mediation*, MEDIATION CTR. OF L.A. (Apr. 28, 2020), https://www.mediationla.org/online-dispute-resolution-the-time-is-now-for-online-mediation/ [perma.cc/AZ44-DRFV]; Marcus Bowman, *The New Normal Mediation: A User Guide*, LEXOLOGY (July 6, 2020), https://www.lexology.com/library/detail.aspx?g=ac617137-d8a5-47c0-8dd4-f63822aa4be5, [perma.cc/E3P9-YXN6].

[132] Joseph W. Goodman, *The Pros and Cons of Online Dispute Resolution: An Assessment of Cyber-Mediation Websites*, 2 DUKE L. & TECH. REV. 4, 12 (Feb. 18, 2003) (citing E. Casey Lide, *ADR and Cyberspace: The Role of Alternative Dispute Resolution in Online Commerce, Intellectual Property and Defamation*, 12 OHIO ST. J. ON DISP. RESOL. 193, 219 (1996)).

[133] *Id.* at 17 (internal citations omitted).

[134] *Id.* at 16.

> state customer base because online mediation provides a forum for their employees and customers to resolve disputes without the matter getting out of hand. Of the three principal types of ADR, negotiation and mediation may be best suited for the Internet because they are less formal methods of dispute resolution - in particular, less formal than arbitration and litigation.[135]

In addition to the convenience benefit, and perhaps most importantly, e-mediation addresses a need for those with unseen disabilities such as PTSD, anxiety, or other traumas or conditions that may make negotiating in a confined space uncomfortable or stressful.

If mediators can provide an accessible e-mediation platform, they will be actively engaging with the competence discussed herein by making mediation accessible to those who need it but who may be averse to more traditional mediation forums.

V. CONCLUSION

Mediation is now used in a high percentage of lawsuits, and accordingly, the parties involved must trust both the mediator and the process for it to work. The present and increasing diversity of parties involved in mediation means that parties to a dispute may have very different ways of listening, understanding, trusting, and resolving disputes. If steps illustrated in this Article are adopted, such as developing a more diverse pool of mediators, increased training around cultural and individual differences, and consideration of other aspects of mediation that may deter people from taking advantage of mediation, mediation may become the preferred method of dispute resolution.

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[135] Amy S. Moeves & Scott C. Moeves, *Two Roads Diverged: A Tale of Technology and Alternative Dispute Resolution*, 12 WM. & MARY BILL RTS. J. 843, 861 (2004). The authors cite the significant burdens of litigation in time, cost and emotional investment, while also remarking that only 1.5% of all lawsuits filed actually result in a jury verdict, as a basis for why ADR is quickly becoming the method of choice in the United States to address conflict. *Id.* at 844. They also address the benefits of ADR, which include saving time and money, giving parties open and flexible processes, permitting them to achieve results tailored to their needs, enhancing community justice, and broadening societal access to justice. *Id.* They go on to address added benefits of virtual mediation.

> Online mediation will save on the costs of physical conference and meeting space; the parties and the mediator do not have to travel to a central location; and, because extensive written communication is involved, the parties may be more deliberate and efficient in their communication, and it may be easier to memorialize the agreements reached.

Id. at 860.

The growth of mediation has found resounding encouragement from lawyers, judges, corporate professionals, and everyday people, given the negative emotional and relational costs of litigation. Improving the mediation practice with greater cultural and individual understanding is not an easy undertaking, and it will take time. However, as Justice Ruth Bader Ginsburg so eloquently stated, "real change, enduring change, happens one step at a time."[136]

[136] MARY ZAIA, YOU CAN'T SPELL TRUTH WITHOUT RUTH: AN UNAUTHORIZED COLLECTION OF WITTY & WISE QUOTES FROM THE QUEEN OF SUPREME, RUTH BADER GINSBURG 59 (2018).

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